Supreme Court, U.S.
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No. 98-——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

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INMATES OF D.C. JAIL, *et al.*,
*Petitioners,*

v.

DIRECTOR, DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the attorneys' fees provisions of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), apply to pending cases in which the entitlement to fees was judicially determined prior to the statute's enactment, but the fees in question were awarded for services rendered after enactment of the statute. This is the same issue that the Court granted certiorari to review in *Johnson v. Hadix*, No. 98-262 (U.S. Nov. 16, 1998).

## LIST OF PARTIES

1. The petitioners in this Court are two classes of inmates at the District of Columbia Central Detention Facility ("Jail"). One class consists of all pretrial detainees held at the Jail and was certified as a class by the district court on November 10, 1971 in the case styled *Campbell v. McGruder*, No. 71-1462 (D.D.C.). The second class consists of all convicted prisoners held at the Jail and was certified as a class by the district court on February 3, 1975 in the case styled *Inmates of D.C. Jail v. Jackson*, No. 75-1668 (D.D.C.). The two classes are plaintiffs in the district court and were appellees in the court of appeals.

2. The respondents are the Director of the District of Columbia Department of Corrections, currently Dr. Calvin Edwards; the Warden of the Jail, currently James Riddick serving in an acting capacity; and the Mayor of the District of Columbia, currently Marion Barry, Jr. These parties are defendants in the district court and were appellants in the court of appeals.

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INMATES OF D.C. JAIL, *et al.*,
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DIRECTOR, DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS, *et al.*,
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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

The Inmates of the D.C. Jail ("petitioners") hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit dated October 30, 1998.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The prior opinions of the district court, entered on October 29 and November 7, 1997, are not reported and are reprinted in Appendix B to this petition, *infra.*

## JURISDICTION

The judgment of the court of appeals was entered on October 30, 1998 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The statutes involved are 42 U.S.C. § 1988, and §§ 802 and 803 of the Prison Litigation Reform Act, 42 U.S.C. § 1997e; 18 U.S.C. § 3626. Pertinent portions of the statutes are reproduced in Appendix C, *infra*.

## STATEMENT OF THE CASE

### A. Overview of the Litigation

This case arises out of two actions brought against officials of the District of Columbia ("the District") to remedy unconstitutional conditions at the District of Columbia jail ("Jail"). The first case—*Campbell v. McGruder*—was filed in 1971 on behalf of pretrial detainees. The second case—*Inmates of D.C. Jail v. Jackson*—was filed in 1975 on behalf of convicted prisoners. The two cases were consolidated in the district court and have been litigated together. The district court found that conditions at the Jail were unconstitutional, with severe overcrowding, inadequate health care, unsanitary conditions and unsafe facilities. *Campbell v. McGruder*, 416 F. Supp. 100 (D.D.C. 1975). On appeal, the District of Columbia Circuit affirmed, noting that the life of the prisoners at the Jail has been "marked by deprivation, neglect and degradation." *Campbell v. McGruder*, 580 F.2d 521, 551 (D.C. Cir. 1978).

In the ensuing years, the District consistently violated the district court's orders and failed to bring the Jail up to minimum constitutional standards. In 1985, for example, the district court again found that conditions at the Jail violated the prisoners' constitutional rights. The court expressed its frustration with the District's continued failure to meet constitutional standards:

> Time and again, defendants [the District] have requested the Court to defer to their accumulated wisdom, to stay its hand and to give them more time. Time and again, these requests have been honored in the hope and expectation that defendants would solve these problems expeditiously and effectively. However, instead of matters improving they have deteriorated.

Memorandum and Order, July 15, 1985, at 50. The District's noncompliance continued, and in 1993 the district court appointed a Special Officer, pursuant to Rule 53, Fed. R. Civ. P., "to assist the Court in effecting future compliance with its orders." Order, April 20, 1993. The Special Officer found the District to be in substantial noncompliance with the court's orders. Special Officer's Status Report, Feb. 2, 1994.

The District did not dispute the Special Officer's findings and agreed to be held in contempt as part of a consent order. Consent Order, March 16, 1994. The Consent Order contained a remedial plan with a specific timetable to achieve compliance with constitutional requirements. The District again failed to comply. Special Officer's Status Report, July 3, 1995. In light of the continued noncompliance, particularly egregious with regard to medical and mental health care services, the court appointed a Receiver for medical care at the Jail:

> Over the more than 20 year history of this litigation the Court has attempted all measures short of the appointment of a receiver to obtain the defendants' compliance with its orders. The Court finds that no other less intrusive remedial measure will succeed in compelling the defendants to satisfy their court-ordered obligations.

Findings and Order, July 11, 1995. Since then, the Special Officer and the Receiver have been endeavoring to improve conditions at the Jail, with continuing day-to-day participation and monitoring by petitioners' counsel in an attempt, as the court of appeals recognized, "to

ensure that after twenty-seven years, the District of Columbia ends its continuing violations of the prisoners' civil rights." (App. 4a). The case is presently ongoing under the watchful supervision of the district court.

**B. Fee Awards**

In 1985, Petitioners' counsel applied for reimbursement of attorneys' fees and expenses pursuant to 42 U.S.C. § 1988. On February 12, 1988, the district court issued orders determining that petitioners' counsel were entitled to recover fees at market rates for work done on the case, including work done to monitor the District's compliance with court orders. Fees were awarded at that time for the period from October 1983 through November 1986. Following the ruling, the District's continuing noncompliance required continuing monitoring and enforcement activities by petitioners' counsel. Consequently, counsel submitted periodic fee applications for services rendered in the case. In each instance, fees were awarded by the court, often with the agreement of the District. Until the enactment of the Prison Litigation Reform Act ("PLRA" or the "Act"), the District did not challenge petitioners' right to recover attorneys' fees at market rates.

This case arises out of fee applications for work performed after the PLRA took effect on April 26, 1996. As with the prior applications, petitioners sought to recover fees at market rates, which then ranged from $130 to $340 per hour depending on experience level. The District objected to any award based on market rates, citing § 803(d) of the PLRA, 42 U.S.C. § 1997e(d), which provides:

> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

Under the formula established by this provision, petitioners' counsel would be limited to compensation at the rate of $112.50 per hour.

The district court rejected the District's argument, holding that the PLRA could not be applied retroactively to reduce the fees recoverable by petitioners' counsel. (App. 15a). The court found in the text of the Act a clear indication that Congress did not intend § 803(d) to be applied to cases filed before the effective date of the Act. (App. 17a). The court also concluded that application of the PLRA to petiitoners' application would result in "manifest injustice" because petitioners' right to market-rate fees was determined in 1988 and became vested at that time. (App. 20a). Given counsel's involvement in the case throughout its lengthy history, the court found that it would be "manifestly unjust to upset Plaintiffs' long-standing expectations and create a financial windfall for the Defendants by imposing new guidelines retroactively to pending cases." (App. 20a).

### C. Disposition in the Court of Appeals

The Court of Appeals for the District of Columbia Circuit reversed in a 2-1 decision. (App. 1a). The majority found nothing in the language of the PLRA indicating that the attorneys' fees provisions should only be applied prospectively. (App. 7a). In this respect, the court expressly declined to adopt the position taken by the Sixth Circuit in *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998), *cert. granted*, No. 98-262 (U.S. Nov. 16, 1998). (App. 6a). The majority went on to hold that when the PLRA attorneys' fees provisions are applied to work performed after the effective date of the Act, no retroactivity concerns are presented because "the statute creates present and future effects on present and future conduct, and has no effect on past conduct." (App. 7a). The majority found that the PLRA does not "impair rights or upset expectations that did not exist prior to its passage and could not exist after its passage." (App.

8a). The majority closed by observing that it would have reached a different result if the legal services had been performed before the effective date of the Act. In this respect, the majority expressly disagreed with *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998). (App. 8a).

Judge Wald dissented. (App. 10a). She concluded that, in the absence of clearly expressed congressional intent, the PLRA attorneys' fees provisions should not be applied to post-PLRA work performed to discharge an obligation undertaken before the PLRA was enacted. Judge Wald disagreed with what she viewed as the majority's failure to respect the presumption against retroactivity when "manifest injustice" will result, as well as its reasoning that imposing the fee cap on any work performed after the Act's passage does not constitute a retroactive application. (App. 10a). Judge Wald concluded that under 42 U.S.C. § 1988, which was designed to encourage civil rights litigation, the triggering event for the retroactivity analysis is the lawyer's agreement to undertake the representation. (App. 11a). A subsequent radical change in the lawyer's right to recover fees would have the effect of attaching new legal consequences to events previously completed. (App. 11a). Judge Wald observed that much of the work in this case resulted from the lawyers' efforts to monitor the District's compliance with a series of orders beginning in 1984 and that, under the D.C. Rules of Professional Conduct, the lawyers may be precluded from withdrawing from the case. (App. 13a). Relying upon § 1988, "a rational plaintiffs' lawyer anticipating a long and time-intensive case involving lengthy monitoring and compliance negotiations would have had to have expectations that if he prevailed for his clients he would be paid on the reasonable basis set out in that statute." (App. 13a-14a). Accordingly, Judge Wald found that application of the PLRA to the present case would change the rules of the game midstream and upset settled expectations of both lawyers and their clients. (App. 14a).

## REASONS FOR GRANTING THE WRIT

The courts of appeals are badly divided on the proper application of the PLRA to cases pending at the time of enactment. The Second, Fourth, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits have addressed this issue and have come to inconsistent conclusions and applied different interpretations of this Court's decisions. *Blissett v. Casey,* 147 F.3d 218 (2d Cir. 1998), *petition for cert. filed,* No. 98-527 (U.S. Sept. 29, 1998); *Alexander S. v. Boyd,* 113 F.3d 1373 (4th Cir. 1997), *cert. denied,* 118 S. Ct. 880 (1998); *Hadix v. Johnson,* 143 F.3d 246 (6th Cir. 1998), *cert. granted,* No. 98-262 (U.S. Nov. 16, 1998); *Cooper v. Casey,* 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke,* 94 F.3d 1191 (8th Cir. 1996); *Williams v. Brimeyer,* 122 F.3d 1093 (8th Cir. 1997); *Madrid v. Gomez,* 150 F.3d 1030 (9th Cir. 1998). This Court has granted certiorari in the Sixth Circuit case of *Hadix v. Johnson.* The issue in the *Hadix* case is almost identical to the one in this case, but the Sixth Circuit reached the opposite conclusion.

Whether the PLRA attorneys' fees provisions apply to cases pending at the time of enactment is a critical issue for indigent plaintiffs in this and other prisoner cases. In addition to the appellate court decisions discussed below, at least fourteen other cases have resulted in district court decisions on this issue. *See* n.2 *infra.* Petitioners understand that there are other pending cases filed before the Act was passed where fees have been or will be sought for post-enactment activities, but which have not yet resulted in a ruling on a fee application. Accordingly, the issue is an important one that ought to be resolved by this Court.

### I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS.

Seven courts of appeals have addressed the issue of whether the PLRA attorneys' fees provisions apply to

cases filed before the date of enactment. These courts have interpreted this Court's opinions differently and have come to varying conclusions about the applicability of the new statute to pending cases.

The Fourth Circuit has taken the most extreme position on this issue, holding that the PLRA applies to all awards of attorneys' fees made after the date of enactment, even if the services were rendered prior to enactment. *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997). The Fourth Circuit concluded that if Congress had wanted the PLRA to apply only prospectively, it could have inserted language to do so. *Id.* at 1386. The court purported to rely on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), for the proposition that the availability of attorneys' fees will generally not raise retroactivity problems because attorneys' fees affect secondary rather than primary conduct. *Id.* at 1387-88. The court in *Alexander S.* concluded that the PLRA's limitations on attorneys' fees are not so fundamentally unfair as to result in manifest injustice if applied to work previously completed. *Id.*

The Second Circuit explicitly rejected the Fourth Circuit's "rigid rule" requiring application of the PLRA to all fee awards regardless of when the services were performed. *Blissett v. Casey*, 147 F.3d 218, 220 (2d Cir. 1998). The Second Circuit thought it clear that application of the PLRA attorneys' fees provisions to representations begun before its passage could have a seriously detrimental retroactive effect on previously established rights and reasonable expectations. *Id.* at 221. In lieu of the *Alexander S.* rule, the court identified three possible alternative rules: (a) the PLRA could be applied only to representations undertaken after enactment; (b) the PLRA could be applied only to services performed after enactment; or (c) the matter could be left to the district court's discretion to be decided based on a balancing of pertinent factors. *Id.* at 220. Given the procedural posture of the case, the court found that it did not need to choose

among the rules it outlined. It is worth noting that the award actually affirmed in *Blisset* allowed fees at market rates for services performed both before and after enactment of the PLRA. Since *Blissett*, one of the district courts in the Second Circuit has adopted reasoning similar to that in *Blissett* and refused to apply the PLRA's attorneys' fees provisions to work performed after passage of the Act. *Muhammad v. Coughlin*, 91 Civ. 6333, 1998 U.S. Dist. LEXIS 10134, at *26-27 (S.D.N.Y. July 9, 1998).

The Sixth Circuit, in *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998), held that the PLRA was not applicable to fees for services performed after its passage, where the action was filed before passage of the Act. The Sixth Circuit rejected the Fourth Circuit's analysis of the statute and concluded that Congress did not intend the Act to be applied retroactively to pending cases. *Id.* at 252-54. The court thought it significant that another section of the PLRA (§ 802) contains an express direction that it be applied to pending cases, while the attorneys' fee provision (§ 803) has no comparable command. In this respect, the PLRA is analogous to the statutory scheme reviewed in *Lindh v. Murphy*, 117 S. Ct. 2059, 2064 (1997). The Sixth Circuit found further support for the negative inference from the legislative history of the PLRA. Given the presumption against retroactivity, the court held that the Act should be applied prospectively.

The Ninth Circuit staked out a position not shared by any other circuit when it decided *Madrid v. Gomez*, 150 F.3d 1030 (9th Cir. 1998). The Ninth Circuit found in the statute an express command that the fee limitations are to be applied to all awards in all pending cases, regardless of when the legal services were performed. *Id.* at 1035-36. No other court of appeals has interpreted the text of the statute in this manner. The Ninth Circuit apparently misunderstood what constitutes an express statutory command requiring retroactive application. This Court has made it clear that the command must be quite

explicit. *Landgraf*, 511 U.S. at 280; *Lindh*, 117 S. Ct. at 2064 n.4. Section 802 of the PLRA includes such a command.[1] The attorneys' fees provisions in § 803 do not.

The Eighth Circuit in *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996), found that application of the PLRA to a case that was extensively litigated before the Act's effective date would disappoint reasonable reliance on prior law and would be impermissibly retroactive. *Id.* at 1202. In addition, the Eighth Circuit—like the Sixth Circuit in *Hadix*—determined that Congress expressed its intent that § 803 not be applied retroactively when it put express retroactive language only in § 802. *Id.* at 1203. In a later, three-paragraph opinion, the Eighth Circuit held without analysis that the PLRA should be applied to limit fees for work performed after passage of the Act. *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997).

The Seventh Circuit has held that application of the PLRA to fees incurred prior to the Act's passage would be impermissibly retroactive. *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996). This ruling directly contradicts the Fourth Circuit's holding in *Alexander S.*

The present case is the most recent appellate decision on the issue. The District of Columbia Circuit held that the attorneys' fees provisions of the PLRA apply to work performed after passage of the Act. (App. 7a). In so holding, the court rejected the Sixth Circuit's reasoning in *Hadix*, as well as the Fourth Circuit's holding in *Alexander S.* The court appears to have adopted a categorical rule that would never allow market-rate fees for work performed after the enactment of PLRA, no matter what the facts and circumstances of a particular case might be. This case illustrates the harshness of the court's inflexible rule, as Judge Wald's dissent points out. Counsel have

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[1] Section 802(b) provides that it "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." (App. 32a)

been litigating these cases since 1971, and their entitlement to fees at market rates was determined ten years ago. Serious constitutional violations have been found at the Jail, necessitating effective representation. The petitioners and their counsel have justifiably relied on the continuing right to compensation at reasonable market rates. The decision of the court of appeals upsets those settled expectations and works, as the district court found, a "manifest injustice."

This Court should grant certiorari to resolve the split in the circuits and to clarify both the applicability of the PLRA and the standards to be used to determine when new statutes may be applied to pending cases.

## II. THE APPLICABILITY OF THE PLRA ATTORNEYS' FEES PROVISIONS TO CASES PENDING AT THE TIME OF ENACTMENT IS CRITICAL TO NUMEROUS PENDING CASES.

As demonstrated by the many appellate and district court opinions on this issue, there are at least 22 other cases around the country in which indigent prisoner plaintiffs are relying on their attorneys to protect their constitutional rights in cases that were filed before the PLRA was enacted.[2] Other prison litigation cases are pending and

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[2] *Chappell v. Gomez*, No. 93-4421 FMS (N.D. Cal. Aug. 8, 1996); *Anderson v. County of Kern*, No. CIV F-90-0205 GEB JFM P (E.D. Cal. Sept. 30, 1996); *Perrier v. City of Albuquerque*, No. Civ. 95-943 RLP/WWD, Memorandum Opinion and Order (D.N.M. Dec. 17, 1996); *Miller-Bey v. Stiller*, Case No. 93-cv-72111-DT (E.D. Mich. Feb. 25, 1997); *Browning v. Vernon*, Case No. CV 91-0409-S-BCW, Report and Recommendation (D. Idaho Oct. 2, 1996); *Hurley v. Coughlin*, No. 77 Civ. 3847 (RLL) (S.D.N.Y. Dec. 23, 1996); *Dye v. Jackson*, Case No. 95-70065, Memorandum and Order (E.D. Mich. May 22, 1997); *Tragale v. Scheel*, Case No. CV-93-672-DWH, Memorandum and Order (D. Nev. May 21, 1992); *Rodriguez v. Zavaras*, Civ. Action No. 92-N-425, 1998 U.S. Dist. LEXIS 15771 (D. Colo. Oct. 1, 1998); *Muhammad v. Coughlin*, 91 Civ. 6333 (LAP), 1998 U.S. Dist. LEXIS 10134 (S.D.N.Y. July 9, 1998); *Chatin v. New York*, 96 Civ. 420 (DLC), 1998 U.S. Dist. LEXIS

may be affected by a Supreme Court ruling in this case.[3] The applicability of the attorneys' fees provisions to services performed after passage of the Act is critical to many plaintiffs who, in order to obtain representation, must rely on counsel compensated under the Civil Rights Act to protect their constitutional rights.

A clarification by this Court of the retroactivity principles as they affect the PLRA attorneys' fees provisions would be valuable to more litigants than just those who are involved in prison litigation. The varied lower-court interpretations of this Court's opinions concerning retroactive application of statutes indicates that there is confusion among the courts about the proper standards. The Ninth Circuit, for example, has misinterpreted the *Landgraf* standard for an express statutory command requiring retroactive application of a new statute. The District of Columbia Circuit in this case departed from *Lindh*—and from the Sixth Circuit in *Hadix*—when it refused to draw any negative inference from the fact that one section of a statute is expressly made retroactive, while another section is not. Given the confusion among the lower courts, a clarification of the general principles governing retroactivity analysis would be useful.

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8351 (S.D.N.Y. June 4, 1998); *Volk v. Gonzalez*, Civ. Action No. SA-95-CA-63-RBO, 1998 U.S. Dist. LEXIS 3663 (W.D. Tex. March 24, 1998); *Barnes v. Ramos*, No. 94C7541, 1998 U.S. Dist. LEXIS 3129 (N.D. Ill. March 13, 1998); *Collins v. Algarin*, Civ. Action No. 95-4220, 1998 U.S. Dist. LEXIS 83 (E.D. Pa. Jan. 9, 1998).

[3] *See, e.g., Coleman v. Wilson*, CIV S-90-0520, LLK (E.D. Cal.); *Harris v. Angelina County*, Case No. 9:89CV131 (E.D. Tex.); *Moore v. Gregg County*, Case No. 6:93CV312 (E.D. Tex.); *Ruiz v. Scott*, No. H-78-9877 (S.D.N.Y.)

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Argued September 28, 1998 Decided October 30, 1998

No. 97-7234

INMATES OF D.C. JAIL,
*Appellees*

v.

DELBERT C. JACKSON,
*Appellant*

Consolidated with
Nos. 97-7235 and 97-7236

---

Appeals from the United States District Court
for the District of Columbia
(No. 71cv01462)
(No. 75cv01668)

---

Before: EDWARDS, *Chief Judge*, WALD and SENTELLE, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* SENTELLE.

Dissenting opinion filed by *Circuit Judge* WALD.

SENTELLE, *Circuit Judge*: In this suit brought on behalf of the inmates of the D.C. jail, the District of Columbia appeals the district court's award of attorney's fees at market rates for work performed after the passage

of the Prison Litigation Reform Act ("PLRA"), Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), codified at 18 U.S.C. § 3626 and 42 U.S.C. § 1997e. We hold that the attorney's fees limitations in the PLRA apply to all work performed after the effective date of the Act, and reverse the district court for the reasons stated below.

## I. Background

The Prison Litigation Reform Act was designed, *inter alia*, to stop frivolous prisoner lawsuits by placing some of the financial burden for litigation on parties and increasing financial and other burdens on prisoners found to have filed meritless cases. The Act also requires attorneys seeking fee awards to show that the hours they expend in successful suits are directly related to the problems they are trying to solve. Another provision, at issue here, places a statutory cap on the hourly fees that may be awarded to the attorneys who litigate prisoner lawsuits, even in cases which ultimately prove to have merit. Section 803(d) of the PLRA provides in relevant part:

> (d) Attorney's fees
>
> > (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 [Section 2 of the Revised Statutes of the United States (42 U.S.C. 1988)]. . . .
> >
> > . . .
> >
> > (3) No award of attorney's fees . . . shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

42 U.S.C. § 1997e(d). This appeal requires us to determine whether the cap on attorney's fees contained in the PLRA should be applied to work performed in these consolidated cases after the Act became effective, when the original fee award was determined a decade before.

The actions in this consolidated appeal, originally filed in 1971, challenged as unconstitutional the conditions at the D.C. jail. The plaintiffs in the two cases, *Campbell v. McGruder* and *Inmates of the D.C. Jail v. Jackson*, challenged the same conditions at the jails and requested the same relief. (The *Campbell* class comprised pre-trial detainees, while the *Inmates* class comprised convicted prisoners.) In 1975, the district court found that the conditions did indeed violate the Constitution because of severe overcrowding, inadequate health care, unsanitary conditions, and unsafe facilities. The district court issued an injunction ordering the District of Columbia to improve the conditions for inmates. Since the original injunction issued, the district court has found a pattern of continuing violations and has repeatedly issued orders attempting to bring conditions at the D.C. jail into compliance with constitutional minimums. The D.C. jail has been so recalcitrant in complying with court-ordered reforms that the judge whose injunction the plaintiffs' attorneys are monitoring has said that the jail's lack of compliance borders on bad faith. Appellees' Brief at 5 (citing Transcript, Nov. 1, 1994 Hearing, *Inmates of the D.C. Jail v. Jackson* (No. 75-1668) at 19-20 (statement of Judge Bryant)). After years of attempting to get D.C. to voluntarily comply, and appointing a Special Master to coordinate with D.C. in an attempt to alleviate conditions, the district court ordered that the jail's medical and mental health services be placed in receivership in 1995. Now, in addition to the attorneys for the plaintiffs, a court-appointed Special Master monitors compliance with existing orders, and the D.C. jail's medical and mental health services remain under the control of a receiver. This appeal involves the award of attorney's fees to plain-

tiffs' counsel for hours spent monitoring the D.C. jail, attempting to ensure that after twenty-seven years, the District of Columbia ends its continuing violations of the prisoners' civil rights.

## II. Attorney's fees

The award of attorney's fees in this case comes against a complicated statutory backdrop. When the action was originally filed, the *Campbell* plaintiffs included a Section 1983 claim, but dropped it in light of *District of Columbia v. Carter*, 409 U.S. 418 (1973), which held that Section 1983 did not apply to the District of Columbia. The *Inmates* case was filed after the decision in *Carter*, and did not contain a Section 1983 claim. The attorneys litigated the case pro bono for a decade. It was not until Congress amended Section 1983 in 1979 to cover the District of Columbia (*see* Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979)) that the attorneys in this case became eligible for fees. Attorney's fees in civil rights actions had been made available by amendment in 1976. The relevant portion of the Civil Rights Attorney's Fees Award Act, Pub. L. No. 94-559, 62, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988(b)), provides that "[i]n any action or proceeding to enforce a provision of [section 1983] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Supreme Court held that section 1988 applied retroactively to all civil rights cases pending at the time of its enactment. *Hutto v. Finney*, 437 U.S. 678, 694 n.23 (1978). In 1985, the plaintiffs in *Campbell* and *Inmates* moved to amend their complaints to include Section 1983 claims, and filed for attorney's fees under Section 1988.

In February, 1988, the district court awarded the plaintiffs "reasonable" attorney's fees and set the award at market rates. Multiple payments were made from the District to the plaintiffs' attorneys under that order. This

appeal arises because the attorneys now seek a fee award for work performed after the passage of the PLRA. In 1997, the district court awarded attorney's fees for compliance-monitoring work done in 1996 and 1997 at market rates, pursuant to its 1988 order. The district court considered the existence of the PLRA in its order, but found it inapplicable. The district court reasoned that the plaintiffs' attorneys' right to fees vested in 1988 when its first fee award order was issued. In making its determination, the district court applied the test for retroactive application of statutes laid out by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994):

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have a retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

The district court determined that "[a]pplying the PLRA to Plaintiffs' motion for attorneys' fees would contravene the plain language of the statute as well as its legislative history and would result in manifest injustice to the plaintiffs." *Campbell v. McGruder*, No. 71-1462, slip op. at 2-3 (D.D.C. filed Oct. 29, 1997) (mem.). The phrase "any action brought by a prisoner" in Section 802 means any action filed after the effective date of the Act, the district court reasoned. The court concluded in particular that

applying the PLRA limitations retroactively to these cases, which have been litigated by the same groups of attorneys since 1971, would be "manifestly unjust." *Id.* at 6. The District appeals the fee award.

## III. Retroactivity and the PLRA

The inmates urge us to adopt the district court's reasoning that the words "any action brought by a prisoner" mean any action brought after the enactment of the PLRA. That position was adopted by the Sixth Circuit in *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998), and was cited with approval by the district court in its memorandum opinion. They point to the juxtaposition of Sections 802 and 803 of the PLRA, and argue that the explicit application of Section 802 to pending actions shows that when Congress intended a section of the Act to apply retroactively, it did so expressly. *See Jensen v. Clarke*, 94 F.3d 1191, 1203 (8th Cir. 1996) (contrasting congressional treatment of Section 802 and 803 and finding no intent to create retroactive application of Section 803). They argue that taken together, the plain language, the negative inference to be drawn from the absence of retroactivity provisions, and the legislative history all show that the plain meaning of the statute is that it should apply only to actions arising after the passage of the Act.

At the very least, they argue, should the court find that there is some ambiguity, applying the three-part test of *Landgraf* and *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), requires the court to find in their favor because to do otherwise would result in manifest injustice. The inmates cite *Watson v. Secretary of Health, Education and Welfare*, for the proposition that applying a statute that decreases, rather than increases, attorney's fees to work performed in pending litigation after the passage of the statute is impermissible. 562 F.2d 386 (6th Cir. 1977) (interpreting potentially retroactive fee-capping regulation in black lung cases).

We are unpersuaded. We do not find in the statute the plain meaning urged by the prisoners. There is simply nothing in the phrase "any action" that implies, let alone compels, a holding that the statute applies only to actions brought after the passage of the Act. Nor does the language compel resort to legislative history in an attempt to clarify its meaning. We are also not convinced that there is a negative inference to be drawn from a comparison of Sections 802 and 803 of the PLRA. Section 802 of the PLRA amends an entirely different statutory section, 18 U.S.C. § 3626. It is unsurprising that Congress would use differing language to amend different statutory provisions, and the absence of the Section 803 language simply will not bear the burden urged by the inmates. If this case involved a genuine question of retroactivity, that is, if the District were seeking to apply the cap to hours worked before the effective date of the statute, we might find the omission more compelling. But the District advances no such argument, and we join the Eighth Circuit in holding that retroactivity concerns are not implicated when the statute is applied to work performed after April 26, 1996, the date of passage of the PLRA. *See Williams v. Brimeyer*, 122 F.3d 1093, 1094 (8th Cir. 1997).

When it is applied to work performed after the effective date of the Act, the PLRA raises none of the retroactivity concerns that require the analysis used by the district court because the statute creates present and future effects on present and future conduct, and has no effect on past conduct. *Compare Jensen*, 94 F.3d at 1203 (holding that the PLRA did not apply to pre-Act work) *with Williams*, 122 F.3d at 1094 (holding that as applied to work performed after the passage of the Act, there is no retroactivity). The fees at issue were earned after the PLRA passed. The PLRA does not in this case upset vested interests because no right to a fee existed until the work was done. Because we find no retroactive effect, we need not consider the Supreme Court's extensive analysis of when to permit retroactive application. *See Landgraf*,

511 U.S. 244; *Lindh*, 117 S. Ct. 2059. As the Supreme Court stated in *Landgraf*, normally " 'a court is to apply the law in effect at the time it renders its decision.' " 511 U.S. at 264 (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)).

In *Landgraf*, the Supreme Court noted that it has adopted a functional definition of retroactivity. *See id.* at 268-69 & n.23. In *Miller v. Florida*, it stated that "[a] law is retrospective if it 'changes the legal consequences of acts completed before its effective date.' " 482 U.S. 423, 430 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)). To determine if a statute has retroactive effect, the court must decide "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. In determining whether the statute has retroactive effect, the court should consider "fair notice, reasonable reliance, and settled expectations." *Id.* at 270. In this case, the work at issue was not done until after the passage of the Act. The attorneys did not possess a right to payment until they performed the work for which the fees were awarded, and thus had no settled expectations. Simply put, as applied in this case, the PLRA does not impair rights or upset expectations that did not exist prior to its passage, and could not exist after its passage. Because we hold only that the fee limitations apply to work performed after the passage of the Act, there is no need to continue the retroactivity analysis.

We stress now the limits of our holding. We do not subscribe to the Fourth Circuit's position that the Act applies to fees awarded after the passage of the Act, regardless of whether the work was performed before the statute was enacted. *See Alexander S. v. Boyd*, 113 F.3d 1373, 1386 (4th Cir. 1997). We find persuasive those cases that have held that the PLRA would have retroactive effect if applied to work performed before the Act

was passed. *See Glover v. Johnson*, 138 F.3d 229, 250 (6th Cir. 1998) ("[A]pplication of the attorney-fee provisions to a fee motion that was pending at the time of the PLRA's passage and that pertained solely to work performed before the statute's passage would undeniably work an impermissible retroactive effect."); *Blissett v. Casey*, 147 F.3d 218, 220-21 (2nd Cir. 1998); *Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996); *Jensen*, 94 F.3d at 1203. Even the District conceded before this court that under *Landgraf*, applying the PLRA to work performed before April 26, 1996 would upset settled expectations and result in manifest injustice. *See Landgraf*, 511 U.S. at 277.

## IV. Conclusion

We hold that applying the fee-capping provisions of Section 803 of the PLRA to work performed after April 26, 1996, does not implicate retroactivity concerns. The Act creates present and future effects on conduct performed after the passage of the Act. Section 803 caps attorney's fes earned after the effective date of the Act at 150% of the hourly rate established by 18 U.S.C. § 3006A, and that fee cap applies to the work performed by the attorneys for *Inmates* and *Campbell* which is at issue in this case. We vacate the order of the district court and remand for proceedings in accordance with this opinion.

WALD, *Circuit Judge*, dissenting: I disagree with the panel that under *Landgraf* and *Lindh* because "the work at issue was not done until after passage" of section 803(d) of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(d), "[t]he attorneys did not possess a right to payment . . . and thus had no settled expectations [of payment]," Majority Opinion ("Maj. Op.") at 8. In the panel's view, the mere fact that the services in question had been performed after the fee cap went into effect meant that the lawyers would not be retroactively hurt even though these services were performed on a case initially undertaken long before the Act. While I agree with the majority that the statutory language is not "plain" as to whether Congress meant to apply section 1997e(d) to pending actions and that the legislative history is ambiguous as well, I do not believe under *Landgraf*'s mandate the panel is entitled to ignore the presumption against retroactive application of a law when "manifest injustice" will result and adopt, as it did, an *a priori* reasoning that imposing the fee cap on any work performed after the Act's passage does not constitute a retroactive application.[1]

The Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), cautioned against drawing cursory conclusions about retroactivity based solely on when the conduct immediately affected by the law in question occurred. As to conduct preceding the passage of the law, the Court admonished:

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[1] My own reading of section 1997e(d), like the district court's, would confine it to cases brought after the passage of the Act. I note section 1997e(a) (dealing with exhaustion) speaks of an action which "shall be brought" and although the section most relevant here, 1997e(d)(1), uses "any action brought," I think it strained to conclude that (d)(1) is meant to apply to pending cases while (a) clearly is not. Section 1997e(d)(3) speaks of an award "in an action described in paragraph (1)," a limiting clause that would seem unnecessary if *any* post-Act award in a prisoner case were to be covered by the cap. In any case, I agree basically with *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998), construing this section not to apply to cases already ongoing in the courts.

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

*Id.* at 269-70 (citations omitted) (footnotes omitted), *quoted in LaFontant v. Immigration & Naturalization Service*, 135 F.3d 158, 161 (D.C. Cir 1998). This caution surely applies as well to conduct occurring temporally after the law is in effect but which is an inextricable part of a course of conduct initiated prior to the law. Acknowledgedly, whether section 1997e(d) "attaches new legal consequences to events completed before its enactment" depends in large part on the answer to the basic question of whether attorney's fee statutes regulate conduct that is merely secondary or ancillary to the parties' conduct, or whether such laws have real impact on the legal rights the parties. *See Landgraf*, 511 U.S. at 275 & n.29. This has been said to present a "close[] question." *Id.* at 289 (Scalia, J., concurring). But I believe that the fee-shifting provision under which this case has been litigated, 42 U.S.C. § 1998—which is designed to facilitate the litigation of worthy civil rights violations—gives rise to a strong argument that the triggering event for retroactivity purposes is when the lawyer undertakes to litigate the civil rights action on behalf of the client. Thus a subsequent radical change in the law as to the lawyer's eligibility, if successful, to collect fees computed in a particular manner for his services does indeed constitute "new legal consequences to events completed before . . . enactment."

An important characteristic of the Court's retroactivity analysis is that it is capacious and flexible enough to account for the circumstances of each particular case. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997) ("In sum, if the application of a term would be retroactive as to Lindh, the term will not be applied, even if, in the absence of a retroactive effect, we might find the term applicable. . . ."); *United States v. Ortiz*, 136 F.3d 161, 166 (D.C. Cir. 1998) (circuits addressing potential retroactivity of AEDPA's amendments to section 2255 "share in their approaches [ ] the requirement that the new enactment be retroactive as applied to the particular claim before the court"). Equity and fairness are also to be considered in the analysis. The Court in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), applied a new fee-shifting provision of the Education Amendments of 1972 to a pending school desegregation case based largely on these principles. The district court in *Bradley* had already exercised its equitable authority to award attorney's fees to the plaintiffs in that case, and "as [the Court's] opinion in *Bradley* made clear, it would be difficult to imagine a stronger equitable case for an attorney's fee award than a lawsuit in which the plaintiff parents would otherwise have to bear the costs of desegregating their children's public schools." *Landgraf*, 511 U.S. at 277.

The plaintiffs make a strong case here that application of section 1997e(d) to work performed after April 24, 1996, is impermissibly retroactive. Section 1988 is a keystone in the enforcement scheme of our civil rights laws. Section 1988 "was no doubt intended to encourage litigation protecting civil rights." *Kay v. Ehrler*, 499 U.S. 432, 436 (1991). As stated in the Senate Report accompanying passage of section 1988, "All of these civil rights laws depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. REP.

No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910. This surely calls for a closer examination of the effects wrought by section 1997e(d) on the prisoners' legal rights than the majority has undertaken. *See also Hensley v. Eckerhart*, 461 U.S. 424, 444 (1989) (Brennan, J., concurring in part and dissenting in part) ("In enacting section 1988, Congress rejected the traditional assumption that private choices whether to litigate, compromise, or forgo a potential claim will yield a socially desirable level of enforcement as far as the enumerated civil rights statutes are concerned."); *Copeland v. Marshall*, 641 F.2d 880, 895 (D.C. Cir. 1980) (parallel fee provision in Title VII must be interpreted broadly because "the prospect of liability for an attorney's fee may help deter discrimination") (footnote omitted); *Ortiz v. Regan*, 980 F.2d 138, 140 (2d Cir. 1992) (section 1988 "was designed to allow private individuals a meaningful opportunity to vindicate civil rights violations"); *Seattle School Dist. No. 1 v. State of Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980) ("The congressional purpose in providing attorney's fees in civil cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law.").

The two prisoners' cases before us now have been in litigation for a combined total of 50 years. The prisoners' lawyers became eligible for attorneys' fees when section 1988 was made applicable to the District of Columbia in 1979, and they have consistently received fee awards at market rates for work performed from 1983 onward. Much of this work has grown out of the lawyers' dogged efforts to monitor the District's compliance with a series of stipulated orders that the parties undertook beginning in 1984. The Rules of Professional Conduct, *see* D.C. RULES OF PROF. CONDUCT 1.16(b), preclude lawyers from withdrawing from a case in midstream except under extraordinary circumstances. It follows that once section 1988 was passed, a rational plaintiffs' lawyer anticipating

a long and time-intensive case involving lengthy monitoring and compliance negotiations would have had to have expectations that if he prevailed for his clients he would be paid on the reasonable basis set out in that statute. Ethical high-grade representation of a class of civil rights plaintiffs, especially prisoners, does not consist of a series of discrete legal services that can be stopped and started again at any time, but rather a continuous responsibility to see the litigation through to its natural conclusion. In that very real sense, the PLRA has changed the rules of the game mid-stream and unsettled settled expectations of both lawyers and clients. Thus I agree with the learned district judge that in the absence of a clear congressional intent, the cap should not be applied to post-PLRA work undertaken to complete a legal obligation entered into prior to the law. In sum, application of the PLRA's limitations on attorneys' fees to legal services performed after the PLRA's enactment on a case undertaken prior to the Act does attach retroactively "new legal consequences to events completed before its enactment"—both for the parties and the lawyers. I therefore respectfully dissent.

**APPENDIX B**

[Filed Oct. 29, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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C.A. No. 71-1462 (WBB)

LEONARD CAMPBELL, *et al.*,
*Plaintiffs,*

v.

ANDERSON MCGRUDER, *et al.*,
*Defendants.*

---

C.A. No. 75-1668
Consolidated Actions

INMATES OF D.C. JAIL, *et al.*,
*Plaintiffs,*

v.

DELBERT JACKSON, *et al.*,
*Defendants.*

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MEMORANDUM

In 1971, a lawsuit was filed on behalf of a class of pretrial detainees and a lawsuit was filed by a class of convicted residents of the District of Columbia Jail ("jail") both of which challenged as unconstitutional the conditions of the jail. On July 15, 1985, this Court issued a memorandum and order prohibiting further intake of inmates at the jail unless the population was reduced to a certain level. Subsequent negotiations between the parties

resulted in an August 22, 1985 stitpulation which required defendants to reduce overcrowding and improve conditions at the jail. On February 12, 1988, Plaintiffs were awarded "reasonable" attorneys' fees pursuant to the Attorney's Fees Award Act, 42 U.S.C. § 1988 (1976). Until the passage of the Prison Litigation Reform Act of 1995, Public Law No. 104-134, 110 Stat. 1321 ("PLRA" or "the Act"), the parties in these consolidated actions had filed several consent orders apprising the Court that they had conferred and agreed on reasonable awards of attorneys' fees and costs for monitoring compliance with the Court's orders. No such agreement has been possible on Plaintiffs' Motion for Award of Attorneys' Fees and Expenses filed on May 9, 1997 for such work done in the months of May 1996 through April 1997. This lack of agreement results from a dispute concerning the proper application of the PLRA to Plaintiffs' present motion for an award of attorneys' fees.

Plaintiffs contend that the PLRA does not apply to their case since Plaintiffs' claims were successfully litigated and their entitlement to attorneys' fees was established prior to the passage of the PLRA. Plaintiffs assert that, like before, they should be entitled to a fee commensurate with "market rates" under 42 U.S.C. § 1988(b). Defendants, however, contest Plaintiffs' claim for attorneys' fees at "market rates" and insist that the PLRA's limitation on attorneys' fees awarded, § 803(d) (codified as 42 U.S.C. § 1997e(d)), applies to Plaintiffs' request which involves attorneys' fees for work performed after the passage of the Act. They claim that the hourly rate for fees incurred after the passage of the Act is limited to an hourly rate less than or equal to 150% of the Criminal Justice Act Rate or $112.50 per hour. 42 U.S.C. § 1997e(d).

The Supreme Court has stated that "a court is to apply the law in effect at the time it renders its decision, unless

doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 277 (1994) (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)). If applying a new statute would have retroactive effect, then "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*, at 269. Applying the PLRA to Plaintiffs' motion for attorneys' fees would contravene the plain language of the statute as well as its legislative history and would result in a manifest injustice to the plaintiffs.

Congress expressly prescribed the reach of the statute. Both the statute's plain language and the negative inference that can be drawn from Congress' express inclusion of a provision making sections other than those that apply to attorneys' fees applicable to pending cases, demonstrate that Congress did not mean for the Act to apply to actions filed by prisoners before the PLRA was signed into law.

Paragraph one of Section 803(d) of the Act applies the Act's provisions "[i]n any *action brought by a prisoner* who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988)." Section 803(1) (emphasis added). Section 803(d)(3) of the Act then states, "No award of attorney's fees *in an action described in paragraph (1)* shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for the payment of court-appointed counsel." Section 803(d)(3) (emphasis added). Therefore, the plain language of the PLRA mandates that *when a prisoner brings an action* after April 26, 1996, the date the PLRA was signed into law, any attorney's fees awarded pursuant to such an action must comply

with the restrictions imposed by the Act. The Act's language clearly refers to the date the initial action was brought as the applicable date for when the PLRA's provisions regarding attorneys' fees should go into effect. Contrary to Defendants' contention, the Act does not refer to the date on which the work underlying an attorneys' fee application is performed nor does it refer to the date on which an attorneys' fee application is filed or awarded as the time upon which the standards for determining the proper amount of attorneys' fees should be selected.

This Court acknowledges that one court of appeals has addressed the applicability of § 803 of the PLRA to pending cases and has applied the limitations on attorneys' fees to pending cases. That court reasoned that the fee provisions in 42 U.S.C. § 1988(b) are superseded by 42 U.S.C. § 1997e(d) and that the Act is appropriately applied to all attorneys' fees awarded after April 26, 1996 since "[t]here is . . . no award until an order is issued." *Alexander S. v. Boyd*, 113 F.3d 1373, 1386 (4th Cir. 1997). However, this analysis ignores the fact that § 803 (d)(3) (codified as 42 U.S.C. § 1997e(d)) does not stand alone and does not simply refer to any attorneys' fees awarded. Instead this section stands in conjunction with and explicitly refers to paragraph one of § 803 which clearly alludes to a prisoner's initial filing of an action with the court. The date on which an award is filed is irrelevant. Here, Plaintiffs' initial action was brought in 1971 which was quite some time before the PLRA was signed into law and is unaffected by the Act's attorneys' fees limitations.

The organization and history of the PLRA also demonstrates the negative inference that can be drawn from the distinct language Congress used in § 803 of the Act as opposed to the language used in § 802. In § 802 of the PLRA, dealing with available litigation remedies, Congress specifically included language applying it "to all

prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." § 802(b)(1). "Section 803, conversely is silent on retroactive application. Congress saw fit to tell us which part of the Act was to be retroactively applied, Section 802. The exclusion of Section 803 and its fee provisions from that clear statement is inconsistent with the defendants' argument for retroactivity." *Jensen v. Clark*, 94 F.3d 1191, 1203 (8th Cir. 1996). In a recent decision, the Supreme Court endorsed similar negative inferences to be drawn with regard to the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), signed into law only two days before the PLRA. The Court read § 107(c) of the AEDPA which provides, "Chapter 154 . . . shall apply to cases pending on or after the date of enactment of this Act," to exclude similar retroactive application to Chapter 153's amendments. The Court said, "We read provisions of § 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of . . . cases only when those cases had been filed after the date of the Act." *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997). Thus, the Supreme Court has fervently endorsed reading sections amended or enacted by the same Congress in the same bill as clear expressions of how each section should be read in relation to all other sections. In fact, the Court has recommended such a reading in acts of the Congress which passed the PLRA. Here, the absence of language applying § 803 to pending cases is an intelligible indication that this Congress did not want the limitations on the provisions for attorneys' fees to be applied to pending litigation.

Although it is clear from the above analysis that Congress has expressly prescribed the reach of the statute, as called for in *Landgraf*, it is equally apparent that had Congress not been so precise, the Court would still be

forced not to apply the newly enacted statute to pending cases, because such an application would have a retroactive effect resulting in manifest injustice. While it is true that the work underlying the application for attorneys' fees at issue in this case was performed after the passage of the Act, the same attorneys have been representing the Plaintiffs in these cases since the actions were initially filed in 1971. Their familiarity and exposure to the cases over the past 26 years has made them invaluable participants in the ongoing supervision that is required in the jail. No other attorneys could have simply picked up where these attorneys had left off had these attorneys determined that it was no longer in their interest to represent the plaintiffs. Since the initial fee determination, the plaintiffs' attorneys had been awarded and have come to expect "reasonable" attorneys' fees. Their right to receive attorneys' fees at market rate was decreed in this Court's February 12, 1988 order and vested at that time. Only the applicable market rate and how many hours the Plaintiffs had worked were left to be determined by subsequent applications to this Court. Although the Supreme Court has cited attorneys' fee determinations as an example of secondary conduct that does not resemble a case in which it has invoked the presumption against statutory retroactivity, the Supreme Court has also looked to equity when deciding whether to apply attorneys' fees and to the possibility of unforseen financial obligations on the part of the defendant. *Landgraf*, at 277 (referring to *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1969). Given these cases' long history and Defendants' willingness to compensate Plaintiffs at the market rate for the past several years, it seems manifestly unjust to upset Plaintiffs' longstanding expectations and create a financial windfall for the Defendants by imposing new guidelines retroactively to pending cases. For these reasons, an order granting Plaintiffs' motion for an award of attorneys'

fees and expenses in the amount of $101,567.26 pursuant to 42 U.S.C. § 1988 will accompany this memorandum.

/s/ William B. Bryant
WILLIAM B. BRYANT
Senior United States District Judge

Date: October 28, 1997

[Filed Oct. 29, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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C.A. No. 71-1462 (WBB)

LEONARD CAMPBELL, *et al.*,
*Plaintiffs,*
v.
ANDERSON MCGRUDER, *et al.*,
*Defendants.*

---

C.A. No. 75-1668
Consolidated Actions

INMATES OF D.C. JAIL, *et al.*,
*Plaintiffs,*
v.
DELBERT JACKSON, *et al.*,
*Defendants.*

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ORDER

For the reasons set forth in the foregoing Memorandum, it is this 28th day of October, 1997 hereby

ORDERED that the Plaintiffs' motion for attorneys' fees and expenses filed on May 9, 1997 is GRANTED; and it is

FURTHER ORDERED that the Plaintiffs are awarded attorneys' fees and expenses in the amount of $101,567.26.

/s/ William B. Bryant
WILLIAM B. BRYANT
Senior United States District Judge

[Filed Nov. 6, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

C.A. No. 71-1462 (WBB)

LEONARD CAMPBELL, *et al.*,
*Plaintiffs,*
v.
ANDERSON MCGRUDER, *et al.*,
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INMATES OF D.C. JAIL, *et al.*,
*Plaintiffs,*
v.
DELBERT JACKSON, *et al.*,
*Defendants.*

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ORDER

For the reaons set forth in the Memorandum of this Court filed on October 29, 1997, it is this 6th day of November, 1997 hereby

ORDERED that the Plaintiffs' motion for attorneys' fees and expenses filed on August 6, 1997 is GRANTED; and it is

FURTHER ORDERED that the Plaintiffs are awarded attorneys' fees and expenses in the amount of $132,592.00.

/s/ William B. Bryant
WILLIAM B. BRYANT
Senior United States District Judge

## APPENDIX C

# TITLE VIII—PRISON LITIGATION REFORM

## SEC. 801. SHORT TITLE.

This title may be cited as the "Prison Litigation Reform Act of 1995".

## SEC. 802. APPROPRIATE REMEDIES FOR PRISON CONDITIONS.

(a) IN GENERAL.—Section 3626 of title 18, United States Code, is amended to read as follows:

### "§ 3626. Appropriate remedies with respect to prison conditions

"(a) REQUIREMENTS FOR RELIEF.—

"(1) PROSPECTIVE RELIEF.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

"(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless—

"(i) Federal law permits such relief to be ordered in violation of State or local law;

"(ii) the relief is necessary to correct the violation of a Federal right; and

"(iii) no other relief will correct the violation of the Federal right.

"(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

"(2) PRELIMINARY INJUNCTIVE RELIEF.—In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunction relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

"(3) PRISONER RELEASE ORDER.—(A) In any civil action with respect to prison conditions, no prisoner release order shall be entered unless—

"(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be

remedied through the prisoner release order; and

"(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

"(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

"(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

"(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

"(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—

"(i) crowding is the primary cause of the violation of a Federal right; and

"(ii) no other relief will remedy the violation of the Federal right.

"(F) Any State or local official or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of program faciliites, or the prosecution or custody of persons who may be released

from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

"(b) TERMINATION OF RELIEF.—

"(1) TERMINATION OF PROSPECTIVE RELIEF.—

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener—

"(i) 2 years after the date the court granted or approved the prospective relief;

"(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

"(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

"(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

"(2) IMMEDIATE TERMINATION OF PROSPECTIVE RELIEF.—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

"(3) LIMITATION.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

"(4) TERMINATION OR MODIFICATION OF RELIEF.—Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

"(c) SETTLEMENTS.—

"(1) CONSENT DECREES.—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

"(2) PRIVATE SETTLEMENT AGREEMENTS.—(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

"(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

"(d) STATE LAW REMEDIES.—The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

"(e) PROCEDURE FOR MOTIONS AFFECTING PROSPECTIVE RELIEF.—

"(1) GENERALLY.—The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.

"(2) AUTOMATIC STAY.—Any prospective relief subject to a pending motion shall be automatically stayed during the period—

"(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

"(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

"(B) ending on the date the court enters a final order ruling on the motion.

"(f) SPECIAL MASTERS.—

"(1) IN GENERAL.—(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

"(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

"(2) APPOINTMENT.—(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

"(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

"(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

"(3) INTERLOCUTORY APPEAL.—Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

"(4) COMPENSATION.—The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

"(5) REGULAR REVIEW OF APPOINTMENT.—In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

"(6) LIMITATIONS ON POWERS AND DUTIES.—A special master appointed under this subsection—

"(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

"(B) shall not make any findings or communications ex parte;

"(C) may be authorized by a court to assist in the development of remedial plans; and

"(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

"(g) DEFINITIONS.—As used in this section—

"(1) the term 'consent decree' means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

"(2) the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

"(3) the term 'prisoner' means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

"(4) the term 'prisoner release order' includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or non-admission of prisoners to a prison;

"(5) the term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

"(6) the term 'private settlement agreement' means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

"(7) the term 'prospective relief' means all relief other than compensatory monetary damages;

"(8) the term 'special master' means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

"(9) the term 'relief' means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.".

(b) APPLICATION OF AMENDMENT.—

(1) IN GENERAL.—Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

(2) TECHNICAL AMENDMENT.—Subsections (b) and (d) of section 20409 of the Violent Crime Control and Law Enforcement Act of 1994 are repealed.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter C of chapter 229 of title 18, United States Code, is amended to read as follows:

"3626. Appropriate remedies with respect to prison conditions.".

**SEC. 803. AMENDMENTS TO CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.**

(a) INITIATION OF CIVIL ACTIONS.—Section 3(c) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997a(c)) (referred to in this section as the "Act") is amended to read as follows:

"(c) The Attorney General shall personally sign any complaint filed pursuant to this section.".

(b) CERTIFICATION REQUIREMENTS.—Section 4 of the Act (42 U.S.C. 1997b) is amended—

(1) in subsection (a)—

(A) by striking "he" each place it appears and inserting "the Attorney General"; and

(B) by striking "his" and inserting "the Attorney General's"; and

(2) by amending subsection (b) to read as follows:

"(b) The Attorney Geenral shall personally sign any certification made pursuant to this section.".

(c) INTERVENTION IN ACTIONS.—Section 5 of the Act (42 U.S.C. 1997c) is amended—

(1) in subsection (b)—

(A) in paragraph (1), by striking "he" each place it appears and inserting "the Attorney General"; and

(B) by amending paragraph (2) to read as follows:

"(2) The Attorney General shall personally sign any certification made pursuant to this section."; and

(2) by amending subsection (c) to read as follows:

"(c) The Attorney General shall personally sign any motion to intervene made pursuant to this section.".

(d) SUITS BY PRISONERS.—Section 7 of the Act (42 U.S.C. 1997e) is amended to read as follows:

**"SEC. 7. SUITS BY PRISONERS.**

"(a) APPLICABILITY OF ADMINISTRATIVE REMEDIES.—No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

"(b) FAILURE OF STATE TO ADOPT OR ADHERE TO ADMINISTRATIVE GRIEVANCE PROCEDURE.—The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act.

"(c) DISMISSAL.—(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

"(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

"(d) ATTORNEY'S FEES.—(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United

States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that—

"(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

"(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

"(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

"(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

"(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

"(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

"(e) LIMITATION ON RECOVERY.—No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

"(f) HEARINGS.—(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

"(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

"(g) WAIVER OF REPLY.—(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

"(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

"(h) DEFINITION.—As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.".

(e) REPORT TO CONGRESS.—Section 8 of the Act (42 U.S.C. 1997f) is amended by striking "his report" and inserting "the report".

(f) NOTICE TO FEDERAL DEPARTMENTS.—Section 10 of the Act (42 U.S.C. 1997h) is amended—

(1) by striking "his action" and inserting "the action"; and

(2) by striking "he is satisfied" and inserting "the Attorney General is satisfied".

## 42 U.S.C. § 1988

### § 1988(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(2)

No. 98-917

Supreme Court, U.S.
FILED
FEB 11 1999
CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

INMATES OF D.C. JAIL, *ET AL.*,
*Petitioners,*

v.

DIRECTOR, DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS, *ET AL.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## BRIEF IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

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**No. 98-917**

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INMATES OF D.C. JAIL, *ET AL.*,
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DIRECTOR, DISTRICT OF COLUMBIA
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*On Petition for a Writ of Certiorari*
*to the United States Court of Appeals*
*for the District of Columbia Circuit*

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## BRIEF IN OPPOSITION

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## OPINIONS BELOW

The court of appeals decision is reported at 158 F.3d 1357.

## STATEMENT

The petition for a writ of certiorari should be denied or, in the alternative, the writ should issue and the decision below be affirmed.

### A. THIS CASE IS UNIQUE.

Although there is an obvious similarity between this litigation and that before the Court in *McGinnis v. Hadix*, U.S. No. 98-262, 67 U.S.L.W. 3336, *cert. granted*, Nov. 16, 1998, it differs in a crucial respect from both *Hadix* and all the appellate and trial court cases listed in the petition at 7 and 11 nn. 2-3: the fees here were awarded in litigation begun before statutory entitlement to attorneys' fees existed and was therefore brought without any expectation of fee-shifting.

Because of its unique status, there is no relevant conflict among the circuits. While a decision reversing *Hadix* will vacate the court of appeals decision in this case, affirmance in *Hadix* neither requires a reversal nor a remand in this case.

1. In this consolidated litigation, as in *Hadix*, the issue is whether the Prison Litigation Reform Act ("PLRA"),[1] enacting 42 U.S.C. § 1997e(d), limits attorneys' fees for work performed *after* the PLRA took effect on April 16, 1996. In that sense, it also resembles the cases in which four other courts of appeals have held that the PLRA applies to all post-Act work, no matter when the litigation began.[2] It is unlike cases which addressed the second issue in *Hadix*, whether the PLRA applies to fee petitions filed after its effective date for work performed *before* that date.[3]

2. This consolidated litigation began before there was a statutory entitlement to attorneys' fees and was litigated for over a decade on a *pro bono* basis. App. 4a. The *Campbell* suit was filed in 1971 on behalf of pretrial detainees; the *Inmates* suit was filed in 1975 on behalf of convicted prisoners.

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[1] Title VIII, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

[2] *Alexander S. v. Boyd*, 113 F.3d 1373, 1377 (4th Cir. 1997)(civil action filed 1990), *cert. denied*, 118 S. Ct. 880 (1990); *Winters v. Sissel*, __ F.3d __, 1999 U.S. App. LEXIS 870 (8th Cir. No. 97-4203, Jan. 25, 1999)(civil actions filed 1994-1995); *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997)(civil action filed 1993); *Madrid v. Gomez*, 150 F.3d 1030, 1033 (9th Cir. 1998)(civil action filed 1990); *but see*, *Blisset v. Casey*, 147 F.3d 218, 219 (2d Cir. 1998)(reserving issue; civil action filed 1983), *pet. for cert. filed*, No. 98-527 (Sept. 29, 1998).

[3] *See, e.g., Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996).

At the time the complaints were filed, the Civil Rights Act of 1871, 42 U.S.C. § 1983, did not apply to the District of Columbia, *District of Columbia v. Carter*, 409 U.S. 418 (1973), and the fee-generating statute, the Civil Rights Attorney's Fee Awards Act of 1976, P.L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988, had not been enacted.

The *Campbell* lawyers first applied for fees in 1985, fourteen years after filing the complaint, nine years after the amendment of § 1988, and six years after amendment of § 1983 to cover the District of Columbia.[4] The *Inmates* lawyers filed their application in 1985, ten years after their complaint. Both fee requests were for work performed after 1983. In 1988, the district court awarded fees for the 1983-1986 period at market rates because of the intervening changes of law.

Other than the present case, each of the appellate decisions cited in the petition involves litigation begun *after* § 1988 had been enacted. *See*, above at 2, n. 2. The same is true of all of the district court cases cited in the petition at 11, nn. 2-3.[5]

3. Unlike the other cases, then, this litigation implicates no retroactive effects. First, by definition, all of the work for which fees have been awarded was performed after the PLRA took effect. Second, at the time plaintiffs' counsel undertook the litigation, they could have had no expectation of fee-shifting. Even if, as the dissenting judge in this case wrote, "the triggering event" for retroactivity analysis is when a lawyer undertakes litigation (App. 11a), it is clear that the lawyers' initial participation in this litigation was not shaped by expectations of fee recoveries and that their subsequent

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[4] Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979).

[5] The two earliest district court docket numbers listed in the petition are for cases filed in 1977 and 1978; all the others were filed in 1989 or later.

representation was prescribed by ethical rules.[6] Although the lawyers received a windfall as a result of enactment of the amendments to §§ 1983 and 1988, neither petitioners nor the dissent have offered any precedent by this Court or others for the proposition that lawyers who bring a suit in a *pro bono* capacity thereafter acquire permanent "expectations" to fee awards at particular rates when Congress enacts an intervening fee-shifting statute, expectations that cannot be altered by later legislation. Here, the PLRA actually continues the windfall, just not as generously. When the lawyers began, they expected *no* remuneration for their labors; under § 1997e(d), fees remain awardable, but limited to $112.50 per hour. 42 U.S.C. § 1997e(d)(1),(3).[7]

As this Court has noted, "the presumption against retroactivity has consistently been explained by reference to the unfairness of imposing new burdens after the fact." *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994). The Court has therefore held that a statute is retroactive when it "attaches new legal consequences to events completed before enactment" or "impair[s] rights a party possessed when he

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[6] Under District of Columbia Code of Professional Conduct Rule 1.16(b)(1),(4), counsel cannot unilaterally terminate their representation but they may be released from further participation by the court if withdrawal can be accomplished "without material adverse effect on the client" or when continued representation "will result in unreasonable financial burden on the lawyer."

[7] Since adoption of the PLRA, the function of both sets of lawyers has been to monitor the Department of Corrections' compliance with court orders, liability having been established earlier. All fee contingencies have therefore been removed. *See Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995)(monitoring of prison-reform decree "resembles a cash cow"). In fact, counsel's work overlaps with monitoring by a court-appointed "special officer" and by a receiver for medical and mental health services, both paid for by the District of Columbia. *See* App. 3a.

acted." *Id.* at 269; *see* cases cited *id.*, n. 23. By those measures, the limitations imposed by § 1997e(d) in this case cannot be considered retroactive, whatever this Court may decide in *Hadix*.

### B. The Statute Plainly Applies to Awards for All Post-Act Legal Work.

There is one aspect of the issues before the Court in *Hadix* whose outcome could affect this case: if the Court should decide that the language of § 1997e(d) can *never* be construed to apply to post-Act work performed in litigation pending on the effective date of the Act.

That construction would do violence to the plain words of the statute. The District of Columbia has joined in an *amicus curiae* brief on the merits in *Hadix*, which argues that, by its terms, § 1997e(d) applies "in any action brought by a prisoner" irrespective of when the action was "brought." There is no need to repeat arguments already before the Court in *Hadix*. As the court of appeals succinctly noted, "[t]here is simply nothing in the phrase 'any action' that implies, let alone compels, a holding that the statute applies only to actions brought after passage of the Act." App. 7a.

There may be exceptional instances when a procedural statutory change, such as a limitation on attorneys' fees, will have such serious unanticipated consequences that the change should not apply in the particular case, despite the language of the statute. This Court has anticipated the need for some flexibility in those instances. *Landgraf*, 511 U.S. at 275 n. 29.[8]

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[8] Such instances should be extremely rare with respect to a law regulating counsel fees. Fees accrue as costs during the course of litigation just as other assessable costs. *See* § 1988 (fees are awardable "as part of the costs"); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988)(fees were regarded as elements of costs at common law). Future litigation

(continued...)

The present case, in which the fees at issue relate entirely to post-Act work and the plaintiffs and their lawyers began the litigation with *no* anticipation of fee-shifting, plainly does not warrant an exception to Congress's direction that § 1997e(d) apply "in *any* action brought by a prisoner."

No further review is necessary.

## CONCLUSION

The petition should be denied. Alternatively, the writ should issue and the judgment should be affirmed.

Respectfully submitted.

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[8] (...continued)
costs are reasonably considered incidental procedural matters, affecting "secondary conduct," to which intervening laws apply as a matter of course. *See Landgraf*, 511 U.S. at 276-277. Congress presumably was aware of that tradition when it enacted § 1997e(d) post-*Landgraf*.